FEB 14 1974

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner,*

vs.

JESSIE SHORT, et al., and THE UNITED STATES,
Respondents.

BRIEF OF RESPONDENTS JESSIE SHORT ET AL. IN OPPOSITION TO PETITION OF THE HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

HAROLD C. FAULKNER,
351 California Street,
San Francisco, California 94104.
Counsel for Respondents
Jessie Short, et al.

WALLACE SHEEHAN,
WILLIAM C. WUNSCH,
FAULKNER, MCCOMISH & WUNSCH,
Of Counsel.

February, 1974

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO - CA 94105

Subject Index

	Page
Jurisdiction	1
Question presented	2
Statutes involved	6
Statement of the case	6
Argument why writ of certiorari should not be granted	14
Conclusion	22

Table of Authorities Cited

Cases	Pages
Donnelly v. United States, 228 U.S. 243 (1913)	3, 4, 11, 14, 16
Halbert v. United States, 283 U.S. 753 (1931)	22
Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963)	21, 22
Indians of California v. United States, 98 Ct. Cl. 583 (1942)	7
Mattz v. Arnett, 412 U.S. 481 (1973)	11, 14
The Quinaielt Tribe v. United States, 102 Ct. Cl. 822 (1945)	22
United States v. Rickert, 188 U.S. 432 (1903)	19

Orders

Executive Order of 1876	21, 22
Executive Order of October 16, 1891	4, 5, 20, 21, 22

Rules

Rules of Court, Rule 19	14

Statutes

Act of Congress of April 8, 1864, 13 Stat. 39	3, 4, 5, 7, 9, 10, 11, 16, 17, 21, 22
Act of 1887, 24 Stat. 388	19, 20
Act of June 17, 1892, 27 Stat. 52	11, 19
Act of March 3, 1927, Sec. 4 (44 Stat. 1347, 25 U.S.C. 398d)	6, 21
28 U.S.C. Sec. 1255(1)	1, 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1104

THE HOOPA VALLEY TRIBE, *Petitioner,*

vs.

JESSIE SHORT, et al., and THE UNITED STATES,
Respondents.

BRIEF OF RESPONDENTS JESSIE SHORT ET AL. IN OPPOSITION TO PETITION OF THE HOOPA VALLEY TRIBE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Respondents Jessie Short, et al., the Plaintiffs in the United States Court of Claims, present this brief in opposition to the Petition of the Hoopa Valley Tribe for a Writ of Certiorari to the United States Court of Claims.

JURISDICTION

The Petitioner, the Hoopa Valley Tribe, invokes the jurisdiction of this Court under 28 U.S.C. §1255(1).

Section 1255 of the United States Code provides in full as follows:

> "Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted on petition of the United States or the claimant.
>
> (2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired and upon such certification the Supreme Court may give binding instructions on such question."

At the time that the United States Court of Claims rendered its decision in favor of respondents Jessie Short, et al., the plaintiffs and claimants in this case, it granted a motion by the Hoopa Valley Tribe to intervene as a party. However, the statutory grant of jurisdiction in 28 U.S.C. 1255(1) does not authorize a review by this Court of a case in the Court of Claims upon petition of any party except the United States or the claimant. The respondent claimants therefore enter their objection to the jurisdiction of this Court to grant a writ of certiorari upon the petition of the Hoopa Valley Tribe.

QUESTION PRESENTED

The statement of the questions presented in the petition for certiorari of the Hoopa Valley Tribe are so grossly misrepresented that they must be restated by respondents Jessie Short, et al.

Basically there is only a single question presented by the decision of the Court of Claims and that is whether or not the Hoopa Valley Indian Reservation in California, created and later enlarged by Executive Orders validly issued pursuant to the Act of Congress of April 8, 1864, 13 Stat. 39, providing for the establishment of not more than four reservations to accommodate all of the Indians of California, constitutes a single reservation held in trust by the United States for the equal benefit of all California Indians accommodated on such reservation and their descendants.

The decision of the Court of Claims does not as asserted by petitioner present the question:

> "Whether the Hoopa Valley Tribe must surrender to a large group of Yurok Indians a controlling political and economic interest in the Hoopa Reservation (which was established in Hoopa aboriginal territory pursuant to an 1864 'Executive Treaty') merely because the Yuroks' own reservation was technically attached to the Hoopas' reservation by an 1891 Executive Order."

This is so because the Hoopa Valley Reservation as found by the Court of Claims was not established in Hoopa aboriginal territory as the "Hoopa Reservation" by any treaty, but was established by an Executive Order issued on June 23, 1876 in an area which included aboriginal territory of both Hoopas and Yuroks pursuant to the Act of April 8, 1864, 13 Stat. 39, for the benefit of all California Indians who might settle there. (Findings 179-181, Petitioner's Appendix, page 100). As determined by this Court in its decision in *Donnelly v. United States,* 228 U.S. 243 (1913) this

reservation was thereafter validly enlarged by the Executive Order of October 16, 1891 pursuant to the continuing authority of the President under the Act of April 8, 1864. The land added to the Hoopa Valley Reservation by this Executive Order had not, as incorrectly asserted by petitioner, theretofore constituted "the Yuroks' own reservation."

Neither as claimed by petitioner is there presented the question:

> "Whether it is tenable for the Court of Claims to say in one breath that the Hoopa Valley Reservation was created under such circumstances that no tribe could have vested rights in it, and in the next breath to say that the Yuroks are entitled to recover money damages from the United States for infringement of the same nonvested rights."

The Court of Claims did not say that the Hoopa Valley Reservation was created under such circumstances that the Indians accommodated there did not acquire vested rights of any sort. The Court merely ruled, in accordance with this Court's decision in *Donnelly v. United States*, 228 U.S. 243 (1913) that the rights to the benefits of the Hoopa Valley Reservation acquired by the Indians accommodated there were not vested against possible modification by the President in the exercise of his continuing authority under the Act of April 8, 1864 to alter the Reservation boundaries and accommodate additional Indians there. The Court of Claims recognized that all Indians accommodated on the Hoopa Valley Reservation acquired vested rights to share equally in its benefits

which could not be infringed in any way except by Presidential action specifically taken pursuant to the Act of April 8, 1864 to further the Congressional purpose. After the Executive Order of 1891 enlarging the Hoopa Valley Reservation, no further action was taken by the President in respect to that Reservation under the authority conferred by the Act of April 8, 1864.

The decision of the Court of Claims does not as asserted by petitioner present the question:

> "Whether the Court of Claims has jurisdiction to determine that a group of Indians is entitled to enrollment on an Indian reservation when the Secretary of the Interior has ruled, in his plenary discretion, that it is not so entitled."

The Court of Claims determined that the Secretary of the Interior acted arbitrarily and contrary to law in recognizing only a select group of Indians as entitled to the revenues from the major portion of the unallotted trust-status lands of the Hoopa Valley Reservation to the exclusion of other Indians who, by reason of the statute and executive orders creating the reservation, were equally entitled to share in such revenues and many of whom had in fact been carried on the reservation rolls during the years such rolls were maintained. (Findings 188 and 189 and Findings 37-48, Petitioner's Appendix, pages 105 and 31-34). This determination of the Court of Claims constitutes a proper exercise of the judicial function of determining the rights conferred by the statute and executive orders creating the Reservation. This determination

does not present any question of judicial infringement upon any possible plenary administrative discretion to determine mere tribal enrollment.

STATUTES INVOLVED

In addition to the statutes cited by petitioner and set forth in the appendix to its petition, Section 4 of the Act of March 3, 1927 is also involved. This statute provides as follows:

> "Sec. 4. That hereafter changes in the boundaries of reservations created by Executive order, proclamation or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior." (44 Stat. 1347; 25 U.S.C. 398d.)

STATEMENT OF THE CASE

Petitioner's statement of the case, including the Chronology on the initial page of its petition, presents such an inaccurate picture of the true nature of the case and the facts material to the consideration of the question presented that respondents Jessie Short, et al. are obliged to present the following statement. (References to petitioner's appendix are designated by "A.")

This case arose by reason of the unique method adopted by the Congress to provide adequate reservation accommodations for all of the Indians of Cali-

fornia and subsequent actions of officers of the executive branch thwarting the Congressional purpose.

Originally the Congress had sought to provide permanent reservation accommodations for the Indians of California, in a manner frequently employed elsewhere in the United States, by appointing Commissioners to negotiate for treaty reservations for particular tribes. Eighteen such treaties were negotiated with the California Indians and significantly one of them provided for a joint reservation for the Hoopa, Yurok, and Karok Tribes which would have encompassed much of the same area as ultimately became the Hoopa Valley Reservation. (Fdg. 18(e), A. 25). However, the Senate failed to ratify any of these treaties. See *Indians of California v. United States,* 98 Ct. Cl. 583 (1942).

The Congress thereupon made provision for permanent reservations for the Indians of California by enacting the Act of April 8, 1864, 13 Stat. 39, which authorized the President to establish not more than four reservations, as remote from white settlements as possible, adequate to accommodate all of the Indians of the State. (A. 113).

In August of that year Austin Wiley, the Superintendent of Indian Affairs for California, reported to the Commissioner of Indian Affairs that he had posted a public notice of the establishment, pursuant to the Act of April 8, 1864, of a reservation in Klamath County, California of such metes and bounds as might ultimately be approved by the President. He further advised the Commissioner that he was propos-

ing for such reservation the whole of the Hoopa Valley and to the summit of the mountains on each side about five miles. He also informed the Commissioner that in order to induce certain hostile Indians then gathered in the Hoopa Valley to lay down their arms he had negotiated a "treaty" with certain of the younger men provided that the Government would set aside this area as a reservation for the Hoopa, South Fork, Redwood, and Grouse Creek Indians and such other tribes as might thereafter avail themselves of its benefits. The Commissioner of Indian Affairs advised Wiley that the relations of the United States to the Indians of California did not contemplate treaties to be submitted to the Senate for confirmation, but that inasmuch as it was deemed advisable to have the chiefs and leading men of the tribes in question sign a document which would commit them, he was returning the agreement, with additions desired by the Secretary of the Interior, for signature and resubmission. There is no evidence that Wiley's "treaty" was ever signed by any Indians or that the desired additions were ever made known to any Indians or approved by them. Moreover, except for a notice posted by Wiley on February 8, 1865 stating the treaty stipulations were "confirmed", there is no indication that any further attention was ever paid to this document until it was dredged up by counsel for the Hoopa Valley Tribe at the trial of this case. (Fdgs. 12-17, A. 18-24).

On February 18, 1865, Superintendent Wiley issued a public notice defining the boundaries of the Hoopa Valley Reservation as follows: "Beginning at a point

where Trinity river flows into Hoopa valley and following down said stream, extending six miles on each side thereof, to its junction with Klamath river." The reservation as thus described consisted of a tract of land twelve miles square bisected by the lower twelve miles of the Trinity River. Since the Hoopa Valley proper is approximately six miles in length and after leaving the valley the Trinity River flows another six miles through a precipitous canyon to its junction with the Klamath River, the reservation as ultimately proposed by Superintendent Wiley and as eventually formally defined by Executive Order in 1876, was twice as large as originally proposed by Wiley in his "treaty" and in his report to the Commissioner of Indian Affairs in August, 1864. (Fdg. 21, A. 25-27).

The area of the Hoopa Valley Reservation as finally proposed by Wiley and confirmed by the President by Executive Order in 1876 comprised nearly 90,000 acres. (Fdg. 34, A. 31). Only a very small portion of this vast acreage was inhabited, most of it constituting rugged mountain areas. In the Hoopa Valley proper, which consisted of about 4,000 acres, there were a substantial number of the Hoopa tribe living in several villages as well as a number of Indians of the Redwood or Chilula tribe who had recently been induced to move into the valley. A group of Yurok Indians were living in the northern part of the tract in the canyon of the Trinity and to the west a short distance. (Fdg. 22, A. 27).

Since the Act of April 8, 1864 provided for no more than four reservations to accommodate all of the Indians of California and since there was a multitude of

tribes in the State, it was necessarily contemplated from the outset that the Hoopa Valley Reservation would be a multi-tribal reservation for the benefit of all of the Indians who were eventually accommodated thereon. (Fdg. 180, A. 100; Act of April 8, 1864, A. 113). It was contemplated that some 1800 Yurok Indians then living along the Klamath River would move to the reservation. (Fdg. 25, A. 27). In 1869, the government moved more than 300 Indians of the Saiaz or Nogatl, the Wiyot, Wylackie and Sinkyone tribes onto the reservation. (Fdg. 28(a), A. 28). Despite the vast acreage of the Hoopa Valley Reservation as originally established most of it was unsuitable for Indian habitation. Thus in 1891, in order to accommodate on this reservation the numerous Yurok Indians living nearby, President Harrison by Executive Order enlarged the reservation to include a strip one mile on each side of the Klamath River from the then northern boundary of the reservation at the junction of the Klamath and the Trinity to the Pacific Ocean. (Fdg. 33, A. 30). The lower twenty miles of this narrow strip was known as the Klamath River Reservation, an old military-type reservation established in 1855 to confine as many Indians as possible away from white settlers. This reservation had never been formally abandoned. Contrary to the erroneous assertions of petitioner the Klamath River Reservation was never designated as a reservation for the Yuroks. It was created in 1855 merely to confine there whatever Indians the Government saw fit. Various tribes, in addition to the Yuroks, inhabited this military reser-

vation at one time. The intervening strip of land along the Klamath River added to the Hoopa Valley Reservation by the Executive Order of 1891, often referred to as the Connecting Strip, had never theretofore constituted reservation land. (Fdgs. 1-9 and 34, A. 14-16 and 30-31).

The following year by the Act of June 17, 1892, 27 Stat. 52, the portion of this addition to the Hoopa Valley Reservation which had formerly constituted the old Klamath River Reservation was opened for public settlement subject to the prior allotment of homesites and the reservation of village sites for the Indians inhabiting that portion of the Hoopa Valley Reservation. (Fdg. 77, A. 51-52; Act of June 17, 1892, A. 115). This Court has recently ruled in *Mattz v. Arnett*, 412 U.S. 481 (1973) that the Act of June 17, 1892 did not have the effect of terminating the status of this area as part of the Hoopa Valley Reservation. Thus this Court by its decision in *Donnelly v. United States*, 228 U.S. 243 (1913) established that the 1891 addition to the Hoopa Valley Reservation was lawfully made by the President pursuant to the authority granted by the Act of April 8, 1864 and, by its decision in *Mattz v. Arnett*, confirmed that the entire addition remains part of the Hoopa Valley Reservation.

From the time the addition was made in 1891 up until the early 1950's the entire Hoopa Valley Reservation was administered as a single integrated reservation; all of its Indian inhabitants had unrestricted access to and use of all portions of the reservation

and were recognized as having equal rights thereon. (Fdgs. 35-36, 101-131, 167; A. 31, 67-84, 95).

In 1950 when the timber on the vast uninhabited acreage encompassed within the original boundaries of the reservation became commercially exploitable, a group of Indians on the reservation formed an organization of arbitrary composition which they denominated as "the Hoopa Valley Tribe" with the purpose of securing for themselves the benefits of the timber revenues from this area of the reservation to the exclusion of all of the other Indians having equal rights on the reservation. In 1952, the constitution and bylaws of this organization were approved by the Commissioner of Indian Affairs until such time as a suitable organization could be established under State law. (Fdgs. 136-156, A. 85-92). Beginning in 1955 this organization succeeded in obtaining annual per capita payments from the timber revenues from the original area of the Hoopa Valley Reservation exclusively for its members. (Fdgs. 169-172, A. 96-97). This action in the Court of Claims was instituted by all of the other Indians entitled to equal rights on the Hoopa Valley Reservation to obtain their rightful share of the revenues from the unallotted lands on the entire reservation.

In the Court of Claims, the United States and the Petitioner, as Amicus, contended that the Hoopa Valley Reservation as enlarged in 1891 constituted a tripartite reservation united for administrative purposes only and comprised of three separate sections insofar as substantive rights were concerned. This was a con-

tention never theretofore advanced and was simply dreamed-up by counsel in an attempt to retain for a select group of Indians the major benefits of the Hoopa Valley Reservation. It was argued that support for this theory existed in the manner in which the allotment program on the reservation was carried out. However, the Court of Claims found that the highly complex program for allotments on the reservation which extended from about 1890 to 1930 showed no trace of any plan, intention or understanding that the enlarged Hoopa Valley Reservation was composed of three segments insofar as substantive rights were concerned. (Fdg. 186, A. 104).

Since some of the Indians residing on the portion of the Hoopa Valley Reservation added in 1891 received individual allotments containing timber, petitioner seeks to create an impression that it would be unfair for the Indians residing on that portion of the reservation to participate in timber revenues from the unallotted lands of the original portion of the reservation. However, the entire question of individual allotments is irrelevant because plaintiffs seek only their rightful share of the unallotted lands of the reservation held in trust by the United States for the common benefit of all of the Indians of the reservation. Moreover at the time the allotments were made the allotments overgrown with timber in the steep canyon along the Klamath River were of little or no value to the recipients. The allotments made to the Indians in the fertile Hoopa Valley and the adjacent Bald Hills grasslands were far more useful and valuable.

ARGUMENT WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

This case presents no reasons for granting the writ of certiorari of the character set forth as guides in Rule 19 of this Court.

The Court of Claims has not rendered a decision in conflict with the decision of any other federal court.

The Court of Claims has not decided an important question of federal law which has not been, but should be, settled by this Court, nor decided a federal question in a way in conflict with the applicable decisions of this Court. To the contrary, the Court of Claims has decided the questions of federal law necessary for the resolution of this case in conformity with the decisions on these questions of law by this Court in *Donnelly v. United States,* 228 U.S. 243 in 1913 and in its very recent decision last year in *Mattz v. Arnett,* 412 U.S. 481, in which the decision and findings of the trial judge of the Court of Claims in the present case were extensively referred to.

Clearly the Court of Claims has not in any way departed from the accepted and usual course of judicial proceedings.

This case was considered by the Court of Claims upon an abundance of documentary evidence gathered through a number of years of discovery as well as upon the testimony of witnesses on behalf of the plaintiffs. Although the organization denominated as the Hoopa Valley Tribe, with the support of the United States, strenuously resisted participation in this case as a party until the eve of trial, nevertheless

the trial judge permitted the full participation of this organization in the trial and all of the post-trial briefing. Significantly, however, not one of the members of this organization which now claims to be so abused by the decision of the Court of Claims testified as a witness at the trial, although a number of them had been scheduled as witnesses in pre-trial statements filed with the Court.

Following the post-trial briefing which was extensive and in which the Hoopa Valley Tribe actively participated as Amicus, the trial judge spent nearly two years in meticulously analyzing the evidence and the arguments presented and in preparing voluminous and most carefully considered findings. After another round of extensive briefing following the filing by the United States and the Hoopa Valley Tribe, as Amicus, of objections to the trial judge's recommended decision and findings, and after oral argument, the seven judges of the Court of Claims unanimously adopted the decision and findings of the trial judge without a single change.

Petitioner advances three reasons for granting the writ all wholly lacking in merit and all based on inaccurate and misleading statements and unsupported assumptions.

Petitioner's first reason in essence is that:

> ". . . the decision (of the Court of Claims) will have the effect of divesting a major federally recognized American Indian tribe of control over its reservation and destroy its modern, vigorous tribal government."

The findings of the Court of Claims clearly show that the petitioner, the so-called "Hoopa Valley Tribe", which was not organized until 1950, constitutes a select group of arbitrary composition which is not an "Indian tribe" in either the ethnic sense[1] or in the sense of a group composed of all of the Indians entitled to share in the benefits of a particular reservation. (Fdgs. 136-156, A. 85-92). This organization has been wrongfully permitted to control the original twelve-mile-square portion of the Hoopa Valley Reservation and reap its benefits for its members to the exclusion of all of the other Indians having equal rights on the reservation, including many actually residing on this portion of the reservation. The decision of the Court of Claims will have the just and salutary effect of ending the wrongful domination of this organization and setting the stage for the formation of an organization representative of all of the Indians having rights on the entire Hoopa Valley Reservation and entitled to share equally in its benefits.

No portion of the Hoopa Valley Reservation is now or ever has been a reservation exclusively for the Hoopa Valley Tribe organized in 1950 or the ethnic group of Indians known as the "Hoopa" tribe. The terms of the Act of April 8, 1864, pursuant to which the Hoopa Valley Reservation exists, and the ruling of this Court in *Donnelly v. United States*, 228 U.S. 243 (1913) that it was properly enlarged by President

[1]It is important to recognize that the Hoopa Tribe and the other tribes that settled upon the Hoopa Valley Reservation had never historically been politically organized. (Fdg. 109, A. 76-77).

Harrison in 1891 pursuant to the continuing authority of such Act preclude the appropriation of any portion of the reservation for the exclusive benefit of any particular tribe. Since the Hoopa Valley Reservation was one of no more than four reservations required by Congress to be adequate to accommodate the multitude of California Indian tribes it could not be and was not reserved for the exclusive benefit of the Hoopa tribe.[2]

In its argument in support of its first reason for the granting of the writ, petitioner inaccurately contends that the decision of the Court of Claims would constitute a judicial taking of the last remnant of the ancestral homeland of the Hoopas contrary to the solemn promises made to their ancestors in the so-called "Wiley treaty". Quite apart from the fact that this document could not contravene the Congressional mandate expressed in the Act of April 8, 1864, never had any legal effect and has gone entirely unnoticed through the years, it did not even promise the Hoopa tribe the exclusive use of the original twelve-mile-square portion of the Hoopa Valley Reservation. By its terms it offered to provide a reservation for four named tribes, the Hoopa, South Fork, Redwood, and

[2]Petitioner complains that the decision of the Court of Claims is contrary to an opinion rendered by the Deputy Solicitor of the Department of the Interior in 1958, holding that the Hoopa Valley Tribe was entitled to the exclusive benefit of the original twelve-mile-square portion of the Reservation. However, this opinion was not rendered in any administrative proceeding after notice and hearing. It was nothing but an opinion written by "house counsel" for the Department of the Interior in an attempt to justify action already taken. As found by the Court of Claims this opinion does not reflect the facts found by the Court and contains both errors of commission and omission. (Fdg. 174, A. 98).

Grouse Creek and such other tribes as might thereafter avail themselves of its benefits. Moreover, the area for the reservation referred to in this document constituted only the southern half of the twelve-mile-square tract encompassed by the original boundaries of the Hoopa Valley Reservation. (Fdgs. 15-19, A. 19-25). The northern half of this twelve-mile-square tract, to the extent that it was inhabited, was occupied by Yuroks. (Fdg. 21, A. 26).

Petitioner also seeks to create the erroneous impression that any new governing body of the entire reservation would be dominated by non-resident Yuroks to the detriment of the Hoopas, who it is implied are all residents of the Reservation. The findings of the Court of Claims show that "many" of the members of the organization known as the Hoopa Valley Tribe were not residents of the reservation when its membership roll was transmitted to the Commissioner of Indian Affairs for approval. (Fdg. 148, A. 88). Moreover, the constitution and by-laws of the organization known as the Hoopa Valley Tribe (Defendant's Exhibit 135 in the Court of Claims) provides that the members of its governing council shall be elected from members of the organization who have resided at least one year in certain districts located in the small major populated area of the original portion of the Hoopa Valley Reservation. There is no basis for an assumption that the members of the governing body of any new organization representative of all of the Indians having equal rights on the entire Hoopa Valley Reservation would not be composed of Reservation resi-

dents of whatever tribe they might be in the ethnic sense.

In support of its argument in respect to its first reason for granting the writ, petitioner also attempts to create an impression that it would be unjust for all Indians entitled to rights on the Hoopa Valley Reservation to share equally in the timber revenues from the unallotted lands of the original portion of the reservation because some of them received individual allotments of land on the addition which contained timber. All of the individual allotments of land on the Hoopa Valley Reservation were made pursuant to the terms of the General Allotment Act of 1887, 24 Stat. 388. In the area of the reservation which had once been the old Klamath River Reservation, the Congress by the Act of June 17, 1892, directed that individual allotments be made pursuant to the General Allotment Act. In the remainder of the Hoopa Valley Reservation, allotments were made pursuant to the General Allotment Act by Presidential directive. The purpose of the General Allotment Act was to provide each Indian with an individual parcel of land on which he could maintain a settled home and hopefully sustain himself and his family by agricultural and pastoral pursuits. *United States v. Rickert*, 188 U.S. 432 (1903) at pages 437 and 442. In the narrow strip of the Hoopa Valley Reservation along the Klamath River, nearly all of the land available for individual allotment was steep mountainside land some of which contained timber. The Indians who wished to maintain a home in this area had to take the type of land that

was available even though little of it was truly suitable for agricultural or pastoral pursuits. In the original twelve-mile-square area of the reservation there was level fertile land available in the Hoopa Valley proper and open grazing land available in the adjacent Bald Hills area. This land was particularly suitable for the individual allotments contemplated by the General Allotment Act, and at the time of allotment was much more valuable to the individual Indian than any of the allotments in the area along the Klamath River, some of which were larger and overgrown with timber. All of the unallotted lands of the reservation were retained in trust by the United States for the common benefit of all of the Indians of the reservation. What benefits any particular individual may ultimately have reaped from his particular individual allotment is entirely irrelevant to the right of all Indians of the reservation to an equal share in the benefits of the unallotted trust land.[3]

The second reason advanced by petitioner for granting the writ is that if the Hoopa Indians did not obtain vested rights in the original portion of the reservation immune from dilution by the Executive Order of 1891 enlarging the reservation, those Indians accommodated on the reservation by such Executive

[3]Petitioner contends that if allotments containing timber had been made in the original twelve-mile-square portion of the Reservation, there would be little or no unalloted land left in this portion of the Reservation. This contention is completely erroneous. If all of the 365 persons allotted land in the Hoopa Valley proper and in the Bald Hills area had been given allotments containing timber of the maximum size of 160 acres permitted by statute only 58,400 of the 89,572 acres of the original portion of the Reservation would have been utilized.

Order could not thereby obtain any enforceable vested rights in the reservation. This is a wholly spurious argument. The mere fact that any of the Indians accommodated on a reservation by Presidential action pursuant to the Act of April 8, 1864 might have their rights diluted by later Presidential action accommodating additional Indians on such reservation does not constitute a basis for denying all Indians who have in fact been accommodated on such reservation equal rights to its benefits. Thus the Court of Claims has properly ruled that all of the Indians who have been accommodated on the Hoopa Valley Reservation pursuant to the Executive Orders of 1876 and 1891 are entitled to share equally in its benefits. This follows whether or not the President may still have some continuing jurisdiction to dilute these benefits in the future by accommodating additional Indians there.[4]

The third reason asserted by petitioner for granting the writ is that the decision of the Court of Claims improperly infringes on the political and administrative function of determining eligibility for membership in an Indian tribe. It is manifest that this is not the effect of the decision of the Court of Claims. The Court has exercised a proper judicial function, not in determining tribal membership, but in determining what Indians are entitled to share equally in

[4]It is noteworthy that the power of the President to dilute the rights of the Indians of the Hoopa Valley Reservation by changing its boundaries terminated with the passage of the Act of March 3, 1927, 44 Stat. 1347, Section 4 of which prohibits any change in the boundaries of Indian reservations except by Act of Congress. *Cf. Healing v. Jones*, 210 F. Supp. 125 at 181 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963).

the benefits of the Hoopa Valley Reservation pursuant to the Congressional mandate in the Act of April 8, 1864 and the implementing Executive Orders of 1876 and 1891. *Cf. Halbert v. United States,* 283 U.S. 753 (1931); *The Quinaielt Tribe v. United States,* 102 Ct. Cl. 822 (1945) and *Healing v. Jones,* 210 F. Supp. 125 (D. Ariz. 1962), aff'd 373 U.S. 758 (1963). The decision of the Court of Claims is in no way inconsistent with any of the cases cited by petitioner which hold that the determination of the right to membership in an Indian tribe is a political and administrative function.

CONCLUSION

For all of the reasons stated, the petition of the Hoopa Valley Tribe for a writ of certiorari to review the judgment of the United States Court of Claims in Short et al. v. the United States, No. 102-63 (October 17, 1973) should be denied.

Respectfully submitted,

HAROLD C. FAULKNER,
Counsel for Respondents
Jessie Short, et al.

WALLACE SHEEHAN,
WILLIAM C. WUNSCH,
FAULKNER, MCCOMISH & WUNSCH,
Of Counsel.

February, 1974